



Appeals Court Upholds Decision limiting the Right of OSHA to Expand Inspections

Insights

10.09.18

We've waited for over a year to learn if the 11th Circuit Court of Appeals would uphold an earlier court decision saying that OSHA could not expand an injury-based inspection by arguing that injury records and an a Regional Emphasis Program justified the expansion. Not surprisingly, OSHA had appealed the earlier decision.

Even though the decision was under appeal, employers have since raised this concern in other inspections when faced with an effort by OSHA to expand an inspection. The reasoning seemed sound.

Background.

OSHA commenced an inspection after an employee was injured at work while attempting to repair an electric panel using a non-insulated screwdriver. OSHA asked to inspect hazards associated with the electrical accident, **but also to expand the inspection and conduct a comprehensive inspection of the entire facility.**

The employer refused and only consented to an inspection of the electrical accident site. OSHA conducted a limited inspection and found several electrical-related violations.

OSHA then sought a Warrant based on patterns of injuries they found while reviewing 300 Logs, as well as being typical hazards found at a poultry processing facility as set out in the Region's Poultry Processing Regional Emphasis Program.

OSHA claimed that it had probable cause to conduct a comprehensive search of the entire facility for these hazards and the remaining hazards identified in the Regional Emphasis Program. OSHA also asserted that probable cause existed to support a program inspection pursuant to neutral criteria contained in the actual OSHA Emphasis Program.

The employer filed an emergency motion to quash the warrant and the US District Court subsequently accepted the Magistrate Judge's recommendation and quashed the inspection warrant.

In its filings with the 11th circuit, OSHA argued that it had in fact demonstrated “*ample*” reasonable suspicion that an inspection with regard to the five referenced emphasis program hazards would reveal violations of the act. But OSHA conceded that there was no relation between the electrical accident and the hazard at issue.

The Circuit Court disagreed and below is an example of their detailed reasoning:

As to biological and chemical hazards, the United States asserts that “multiple reports of eye infections and eye injuries among workers in the areas where workers encounter live chickens and sanitation chemicals, respectively, provid[e] cause for reasonable suspicion that Mar-Jac is not taking adequate steps to abate biological and chemical hazards.”

The OSHA 300 logs from 2015 contain ten reports of eye injuries, the 2014 logs contain two reports of eye injuries, and the 2013 logs contain zero reports of eye injuries. Therefore, the United States asserts that twelve eye injuries over the course of three years among 1,112 employees provides reasonable suspicion that biological and chemical violations may be found.

The Court disagrees, and holds that these logs on their own fail to establish reasonable suspicion of biological and chemical violations.

Implications.

Ultimately, the ruling is a decision made on a specific set of facts, and Courts may not arrive at the same conclusion every time OSHA seeks to expand the scope. The Court found that OSHA did not establish the necessary Probable Cause. OSHA may do so in another case with different facts.

However, the OSHA arguments rejected by the 11th Circuit are common where OSHA demands to expand the scope of an inspection.

OSHA will almost certainly take the position that this decision, at most controls OSHA cases in states in the 11th Circuit: Georgia, Florida, Alabama and Mississippi. However, employers in other Circuits may want to attempt similar challenges of warrants.

Employers should consult counsel when faced with an OSHA inspection and especially where OSHA seeks to expand the scope.

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